UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KITSAP TENANT SUPPORT SERVICES, INC.	Cases	19-CA-74715
and		19-CA-79006
		19-CA-82869
WASHINGTON FEDERATION OF STATE EMPLOYEES, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 28, AFL-CIO		19-CA-86006
		19-CA-88935
		19-CA-88938
		19-CA-90108
		19-CA-96118
		19-CA-99659

COUNSEL FOR THE GENERAL COUNSEL'S REPLY TO RESPONDENT'S ANSWERING BRIEF

On September 15, 2014, Respondent filed an Answering Brief to General Counsel's Exception ("Answering Brief") in Response to General Counsel's Exceptions ("Exceptions Brief") to the Decision of the Administrative Law Judge ("ALJ"). As set forth below, the General Counsel ("GC") submits that the assertions set forth in Respondent's Answering Brief are without merit, and should be denied in their entirety.[1]

I. THE BOARD MAY SET ASIDE THE ALJ'S CREDIBILITY FINDINGS

The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), *enfd*., 188 F.2d 362 (3rd Cir. 1951). As such, in *Standard Drywall*, the Board found it appropriate to consider the wealth of disparate treatment evidence that the ALJ completely ignored. *Id.* Similarly, the Board has corrected the record for the factual errors committed by the ALJ. *Parson's Electric, LLC.,* 361 NLRB No. 20, Slip op. at 1, n.1 (August 18, 2014).

Respondent, relying on the Supreme Court's decision in *Universal Camera Corp. v. N.L.R.B.,* 340 U.S. 474 (1951), argues that the Board should be reluctant to disturb the ALJ's findings unless error is clearly

[1] References to the decision of the Administrative Law Judge (ALJ) are noted as: JD__:__), which shows the decision page and line respectively. References to the transcript of the proceedings before the ALJ are noted as: (TR__:__), which shows the transcript page and line. References to General Counsel's exhibits will be made as: (GCX__). References to Respondent exhibits will be made as: (RX__).

shown. However, the question before the Court was the extent to which a *court of appeals* could review the Board's evidentiary findings; not whether the *Board* could review an ALJ's credibility findings. In fact, in *Universal Camera Corp.*, the Board's reversal of the trial examiner's credibility findings was affirmed by the Second Circuit Court of Appeals and the U.S. Supreme Court.[2] Thus, Respondent's contention is obvious error and the Board should properly consider and weigh the credible evidence as a whole, and make critical findings of fact based on the credible evidence.[3] (Exceptions Brief page 1)

II. THE BOARD SHOULD FIND THAT RESPONDENT'S RULES VIOLATE § 8(a)(1)

The parties are in agreement that employees have a right under § 7 to communicate regarding their terms and conditions of employment to other employees, an employer's customers, the media, and the public. *Kinder-Care Learning Centers*, 299 NLRB 1171 (1990). (Answering Brief, p.6). However, the GC excepted to the ALJ's failure to discuss Respondent's rules respecting (1) Professional Standards; (2) Conditions of Employment; and (3) Reasons for Termination. (JD 8-9). The GC also posited that the ALJ erred in finding that Respondent's rules regarding Employee Professional Relationships as well as Canvassing or Soliciting were necessary and lawful. (JD 9:33-46) Respondent contends that its policies fall under the recognized exception given to employers who provide patient care. Respondent is mistaken.

With respect to Respondent's canvassing and soliciting rule, although hospital employers may prohibit solicitation in patient care areas (*see, e.g., Beth Israel Hospital v. NLRB*, 437 U.S. 483, 495 (1978)), Respondent's clients are not patients in an acute care setting undergoing medical procedures and treatment.

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[2] The trial examiner discredited the charging party and dismissed the complaint. The Board reversed the trial judge's credibility finding and ordered that the employer reinstate the charging party. After the Second Circuit affirmed the Board decision, the Court held that the Court of Appeals is not barred from setting aside a Board decision.

[3] In its Answering Brief, Respondent contends that Respondent witness Michael Comte testified as an expert witness, and that the GC's failure to address his testimony obscures the record. (Answering Brief, p.4). However, before an expert can testify, the trial judge must first qualify them as an expert. Generally speaking, the witness must have shown that he has sufficient knowledge of his subject to give value to his opinion, but ultimately it is at the discretion of the trial court judge to decide if the witness is qualified to render an expert opinion. *See Norfolk & W.Ry. Co. v. Anderson*, 151 S.E.2d 628, 632 (Va. 1966); *Kumho Tiore Co. v. Carmichael,* 526 U.S. 137 (1999). The ALJ did not qualify Comte as an expert; thus, his testimony should be viewed as biased and slanted to Respondent, given his testimony that he had worked for Respondent dozens of times. (TR 1056:10-12).

As noted in the GC's Exceptions Brief, clients in Respondent's SL program are highly functional and, require only periodic, limited assistance.[4] Thus, the rationale underlying special rules for hospital employers is not applicable to Respondent's SL program. (Exceptions Brief, p.6, ll. 7-8).

In sum, the GC requests that the Board reverse the ALJ's decision on Canvassing and Soliciting and Employee Professional Relationships, and find the remaining rules left unaddressed by the ALJ to be unlawfully overbroad and violative of Respondent's § 7 rights for the reasons set forth in GC's Exceptions Brief.[5]

III. THE BOARD SHOULD FIND THAT RESPONDENT VIOLATED § 8(a)(3) BY STRICTLY ENFORCING RULES AFTER THE UNION WAS CERTIFIED

The GC excepted to the ALJ's failure to find that Respondent started to strictly enforce its work rules by significantly increasing employee discipline after the Union was certified. As noted in GC's Exceptions Brief, despite Respondent's countless rules, repeated citation to Washington State regulations, and records dating back to 1991, the record is devoid of written disciplinary documents short of terminations prior to Unionization. (Exceptions Brief, p.7).

Starting March 16, 2012, the day after the Union won the election, Respondent told employee Lisa Hennings that it now had to start putting actual documentation, such as disciplines, in employee personnel files. (Exceptions Brief, p.8). This type of sudden reversal of an established policy regarding terms and conditions of employment occurring close in time to employee protected activity is strong circumstantial evidence that it is unlawfully motivated. *DeJana Indus.*, 305 NLRB 845, 849 (1991). *See also Treanor Moving & Storage Co., Inc.,* 311 NLRB 371 (1993) (change in policy and practice regarding enforcement of attendance policy after the union won an election violates § 8(a)(3)).

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[4] The exception should also not apply to Respondent's ITS program, which follows the same model as the SL program. (TR 1178:6-10). While Respondent's clients in ITS require more intensive care than those in the SL program, they are neither in an acute care setting, nor undergoing regular medical procedures or treatment in Respondent's staff's care. (TR 29:18-21; 164:21-165:2).

[5] As stated in its Exceptions Brief, the GC excepts to the ALJ's failure to recommend a complete remedy for Respondent's enforcement of these unlawful rules against its employees Bonnie Minor, Gary Martell and Johnie Driskell. (Exceptions Brief, p.7, ll.1-3).

Further, as noted in GC's Exceptions, on October 16, 2012, Respondent expressed its intention to escalate its level of discipline when program manager Alan Frey threatened the Union negotiators by announcing that "if people want more write-ups, they could have them, starting then." (TR 783:13-17, Exceptions Brief, p.8). Respondent carried out that threat by issuing 10 write-ups on October 16 over the issue of narratives, despite there not being a single written warning in the record involving narratives pre-dating the Union's arrival. In its Answering Brief, Respondent argues that Frey's statement was "mere bargaining rhetoric and posturing" and should not be "thrown back" in Respondent's face. (Answering Brief, p.13).

This theory has no basis in law with respect to a violation of § 8(a)(3). Frey's statement clearly shows anti-union animus[6] and, together with the October 16 write-ups, supports a finding that Respondent started to strictly enforce work rules after the Union was certified. *See The Celotex Corp.*, 259 NLRB 1186, 1188 (1982) (employer statement that it was going strictly by the book if the union was voted in violated the Act). Accordingly, the ALJ erred in failing to find that Respondent began to strictly enforce rules and policies after the Union's certification, and failing to order that Respondent expunge any discipline issued to employees as a result of more strictly enforcing its rules and policies, and notify them in writing that it was done. (JD 16-17)

IV. RESPONDENT DISCRIMINATED AGAINST BONNIE MINOR

The Board may infer knowledge based on circumstantial evidence such as the timing of the alleged discriminatory actions, employer's general knowledge of its employee's union activities, employer's animus against the union, and the pretextual reasons given for the adverse personnel actions. *Metro Networks, Inc.,* 336 NLRB 63 (2001). Respondent asserts that the GC failed to prove that it had knowledge of Minor's Union activity when it made the decision to terminate her employment. (Answering Brief, p.18). The argument conveniently ignores the timing of Minor's Union activity in relation to the events surrounding her discharge.

Minor's job title was Head of Household ("HOH"), which is a lead position. On December 1, 2011, Minor earned an outstanding on her performance review. (Exceptions Brief, p.10; GCX 146; TR 236:3-22). On

[6] Frey's statement, although not alleged as violation of § 8(a)(1) does establish anti-union animus.

December 4, the Union engaged in a pre-election "blitz,"[7] and Minor became a core member of the Union organizing campaign. (TR 116, 190:11-191:6). Frey called Minor on the morning of December 7, asking why she cancelled the annual Christmas party.[8] (TR 238, 249, 1344:6-9) Later that day, Frey met with Minor to discuss a complaint made by anti-union employee Joy Woodward that Minor had told the clients that Frey had screamed at her. (TR 1350-51) Frey did not mention that he was considering firing Minor over the cancellation of the Christmas party, nor did he mention that Woodward had complained about her. Ten minutes after her meeting with Frey, Minor attended and took an openly pro-union position at a mandatory anti-union meeting conducted by a labor consultant. (TR 12-13) Shortly after the anti-union meeting ended, Minor was fired for insubordination. (TR 257:15).

The ALJ made three critical errors. First, the ALJ erred in failing to address the close timing between Minor's Union activity and her discharge. Further, it stretches credibility to believe that Frey's decision to discharge Minor was not influenced by her pro-Union statement. If Frey truly believed that Minor had violated company policy, he could have and should have fired her during the afternoon meeting, yet said nothing and allowed her to attend the anti-union meeting. Second, the ALJ failed to consider the evidence of disparate treatment. Ezebrio, Minor's partner in planning and cancelling the party was not discharged, even though his conduct was identical to Minors. Further, Respondent's records reveal that no other member of its staff had ever been terminated for insubordination. (GCX 118,[9] TR 75-76). Finally, the ALJ failed to find that Respondent provided shifting reasons for discharging Minor. (TR 257, 1173-75, 1351-52, 1649). Respondent agent Kathy Grice told Minor by phone on December 7 that she was fired for insubordination. (GCX 116; TR

[7] Union organizer Tim Tharp testified that the organizing campaign became public over the weekend of September 2-4, 2011. The in-house committee members and other outside Union staff engaged in a massive outreach to Respondent's employees. As a result, the Union and committee members contacted over 50 employees, a vast majority of who signed authorization cards. (TR 109-11).

[8] Minor and another HOH, Johnson Ezebrio, had volunteered to plan and put on Thanksgiving and Christmas parties and were jointly responsible for the planning and presentation of these two events. (TR 201, 244, 1168). Although Minor and Ezebrio were co-partners in planning and cancelling the Christmas party, Ezebrio, who had not engaged in the same level of Union activity as Minor, was not disciplined, while Minor was discharged. (TR 274:8-11; 1168:10-24).

[9] GCX 118 shows two Caregiver Documented Events, dated 11/22/2011 and 12/5/2011, in which staff yelled at supervisor Dawn Worthing; no discipline resulted and neither staff member involved was fired. (TR 75-76).

257). When pressed on the stand, Frey failed to provide an explanation of how Minor had been insubordinate. (TR 75, 116). He later changed his testimony to state that insubordination was not his concern. (TR 1173-75) Further still, Frey testified again that Minor was fired for cancelling the Christmas party. (TR 1649) In short, the timing, pretext evidence and showing of disparate treatment make clear that Minor would not have been fired, but for, her Union activity.

V. RESPONDENT DISCRIMINATED AGAINST ALICIA SALE AND HANNAH GATES

Evidence of timing is critical as it relates to both the suspension and termination of Sale and Gates, known Union adherents who worked together in the same household. Their pictures appeared on the Union organizing committee flyer, mailed about mid-December 2011, which Frey testified having seen before he made the decision to terminate them. (ERX.23; TR. 210; 1172:1-2; 1190; 1243:22-25; 1250:16-19). On the morning of December 20, they called their HOH Jessica Lanzoratta to report that client R had a small bruise on his leg and complained of a stomach ache. Lanzoratta called Respondent's office and Frey and supervisor Middelhoven showed up at the house to investigate sometime between 9-10 am. (TR 668-69). After 15 to 20 minutes at the men's house, Frey and Middelhoven returned to the office.[10] (TR.82:12-15). After a plan was put in place to take R to the doctor, Sale replaced Lanzarotta and Gates remained at the house. Middelhoven then wrote up an incident report noting that Sale and Gates remained working as usual. (GCX 120).

At about 2:04 p.m. that day, Region 19 faxed the Union's certification petition to Respondent. (GCX 121). Three days later, after their shifts ended on Friday December 23, Sale and Gates were abruptly informed that they were being placed on administrative leave.[11] (TR 611:11-19, 680:14-25). As set forth in detail in the GC's Exceptions Brief, the ALJ's failure to consider Respondent's sudden change in attitude toward Sale and

[10] Frey examined R and asked him if he wanted to see a doctor. (TR 1326:7-9, 1727:7-10) He also checked the abrasion and concluded that R's wheelchair needed to be taped, and asked Sale to tape it. (TR 608:3-14, 1324-25).

[11] Frey reported the incident to the Washington State Department of Health. The State investigator contacted Frey for the first time on January 31, 2012. Respondent fired Sale and Gates on February 1. On February 2, the State investigator took statements from Frey, Sale, Gates and client R. (TR 710:3-9, 711-14; Rej. GCX 158). On March 27, 2012, the State cleared Sale and Gates of any misconduct. (GCX 152, 157).

Gates after receiving a fax transmission of the employees' petition for a representation election is grounds for reversal.

The record also established that the sudden suspension and discharge was pretextual, and contrary to Respondent's assertion that the GC is "diverting attention from the real issues" (Answering Brief, p.26) evidence of pretext here is fatal to Respondent. Pretext based on disparity of treatment is inferred where Respondent has a history of tolerating certain bad behavior, in this case, client safety/abuse, which it submits as justification for suspending and discharging Sale and Gates. *See Empire Dental*, 211 NLRB 860, 866 (1974), *enfd. sub nom*., *NLRB v. Williams*, 538 F.2d 337 (9th Cir. 1976). Respondent had a history of tolerating client abuse. For example, in December 2011, during the same time frame as the Sale and Gates' incident, a staff member reported that fellow staff Jackie Kavanaugh physically abused a client and was not terminated;[12] and in August 2011, a staff member Gerry Goodman was accused of *causing* a client's ankle injury but was not terminated.[13] Respondent's inability to overcome this evidence of timing, disparate treatment, and pretext is grounds for the Board to reject Respondent's arguments and find that Respondent unlawfully suspended and terminated Sale and Gates.

VI. RESPONDENT DISCRIMINATED AGAINST GARY MARTELL

As with Minor, Sale and Gates, timing is critical to Martell's suspension and termination. As a new employee, Martell struggled to perform his paperwork duties from January through May 2012 and often showed up with incomplete financial paperwork. Yet, Respondent's Specialists, Jamie Callahan and Molly Parsons were consistently cooperative and helped Martell complete the work. (TR 934). However, after May 22, 2012,

[12] Kavanaugh was reported to have been yelling at her client while attempting to force her chair from behind. Kavanaugh then escorted the client to her room yelling at her on the way. Respondent put Kavanaugh back on shift immediately the next morning, without placing her on administrative leave. She was not terminated for this incident. (GCX 123; TR 90)

[13] When Goodman caused the ankle injury, it was alleged to not have been an accident. Respondent's response was to re-train Goodman and put him back to work. Goodman was not disciplined for his apparently egregious action, despite the fact that he was not allowed to work alone again with the client in question. (GCX 125; TR 91) For more examples of disparate treatment in the record, see, e.g.: (TR 90-94, 604:22-605:14; GCX 126, 127; RX 132 9a) Bates 181, 132(b) Bates 165)

when the Union informed Respondent that Martell had been selected by his peers to serve on the Union's bargaining committee, things changed. (GCX 6).

At his June 8, 2012 paperwork meeting, which was the first such meeting after he was elected to the bargaining committee, Martell presented himself, as usual, with partially incomplete financial paperwork. (TR 1795, 1810). When Callahan heard that Martell's paperwork was incomplete, Callahan immediately told Frey. (TR 938:18-23, 1795:21-25, 1820:11-12). That same day, Frey suspended Martell. On July 13, while on administrative leave, Martell attended his first bargaining session as a member of the Union's bargaining team. (TR 953:1-3). Frey was there representing Respondent. (TR 953:15-16). On July 19, Frey terminated Martell. Although Respondent's June 8 and July 19 disciplinary documents listed multiple reasons that had arisen months before underlying Martell's suspension and discharge, these "reasons" had resulted in no prior discipline or warning until he was elected to the Union's bargaining committee in May 2011.

The Board has long held that an inference of unlawful motive is raised where adverse actions occur shortly after an employee has engaged in protected activity. *La Gloria Oil & Gas Co.*, 337 NLRB 1120 (2002). The ALJ was plainly erred in failing to connect the timing of Respondent's disciplinary actions against Martell and his election to the bargaining committee. Based on the above, and the record as a whole, the GC respectfully requests that the Board find that Martell's suspension and discharge were unlawful.

VII. RESPONDENT DISCRIMINATED AGAINST LISA HENNINGS

Respondent knew in December 2011 that Hennings was a Union supporter.[14] As with the other discriminatees, timing is critical as it relates to Hennings' disciplinary actions. She was disciplined for failing to properly fill out a medical error form on August 15, 2012, five days after attending a bargaining session as a member of the Union bargaining team. (TR 521:11-522:5). However, Respondent routinely tolerated such errors and the record is replete with examples of medical errors for which there was no discipline. (GCX 166a-gggg; TR 1137-38). As Frey admitted, medical errors happen every day in this line of work. (TR 1511, 1563).

[14] Hennings' picture and name appeared on the Union organizing committee flyer which Frey saw in December 2011. (RX 23; TR 1172:1-2, 1190, 1243:22-25)

Hennings' August 20, 2012 written warning for leaving her shift while her co-workers covered for her was also pretextual, as Frey admitted that her co-workers were not disciplined for agreeing to this arrangement. (TR 1699).

VIII. RESPONDENT FAILURED TO PROVIDE AND/OR DELAYED IN PROVIDING INFORMATION

The GC excepted to the ALJ's failure to find that Respondent failed to make a finding on the following failure to provide information allegations: (1) Respondent's failure to respond to the Union's May 21, 2012, request that it identify its Board of Directors; (2) Respondent's partial response the Union's June 1 request for unit information; and (3) Respondent's delay of three months in responding to a July 17 request for documents. Such failure to provide and/or delay in providing information is an indicia of bad faith bargaining. *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1044 (1996).

IX. RESPONDENT'S BARGAINING POSITIONS WERE REPUGNANT TO THE UNION

The following of Respondent's bargaining proposals were repugnant to the Union: management rights, discipline, grievance arbitration and at-will. Respondent's first management rights proposal on August 3, 2012, would virtually render the Union powerless because it would exclude the Union from participating in discussions affecting important terms and conditions of employment. (GCX 22, pp. 7-9). Respondent's modified management rights proposal on October 16 still granted Respondent all powers not specifically abridged by the bargaining agreement, and proposed an even greater list of specific powers.

Respondent's proposal on discipline stated, in part, "the degree of discipline to be imposed is solely within the judgment and discretion of KTSS." Thus, Respondent reserved the right to decide when it is appropriate to apply progressive discipline. (GCX.22, p.21). In view of the extraordinary breadth of the management rights clause and the Respondent's at will employment provision, little would be subject to the grievance procedure.

Respondent's grievance/arbitration proposal removed the authority of the Union to file a grievance by removing an arbitrator from the equation by forcing the Union to file a lawsuit in the Superior Court of Kitsap County over alleged contract violations. (GCX.22, p.31) These proposals leave virtually every decision to the

complete discretion to Respondent. Based on the above, the GC respectfully request that the Board find that Respondent has engaged in bad faith bargaining by submitting proposals that are repugnant to the Union.

X. CONCLUSION

The GC requests that the Board deny Respondent's Answering Brief in its entirety.

Dated at Seattle, Washington this 29th day of September, 2014.

Respectfully submitted,

/s/ Richard Fiol
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CERTIFICATE OF SERVICE

I hereby certify that a copy of Counsel for the General Counsel's Reply to Respondent's Answering Brief was served on the 29th day of September, 2014, on the following parties:

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